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PROMOTION AND PROTECTION OF HUMAN RIGHTS

Fundamental standards of humanity

Report of the Secretary-General submitted pursuant to Commission resolution 2000/69

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I. INTRODUCTION

1. In its resolution 2000/69, the Commission on Human Rights recognized the desirability of a process of identifying and respecting fundamental standards of humanity applicable in all situations in a manner consistent with international law, including the Charter of the United Nations. The Commission requested the Secretary-General, in consultation with the International Committee of the Red Cross (ICRC), to submit a further report covering relevant developments to the Commission at its fifty-seventh session.

2. The Commission, taking note of the report of the expert meeting on fundamental standards of humanity (E/CN.4/2000/15) convened in Stockholm from 22 to 24 February 2000 by the Governments of Denmark, Finland, Iceland, Norway and Sweden, invited States, international organizations and non-governmental organizations to engage in discussions in relevant forums on strengthening the protection of the individual in all situations, with a view to promoting the ongoing process of fundamental standards of humanity.

3. The present report reflects relevant recent developments in relation to these issues. The comments and advice of ICRC in the preparation of the report are gratefully acknowledged.

II. GENERAL COMMENTS

4. As has been noted in previous reports (E/CN.4/2000/94, paras. 7-12; E/CN.4/1999/92, para. 3; E/CN.4/1998/87, para. 8) the need for identifying fundamental standards of humanity arises from the recognition that it is often situations of internal violence that pose the greatest threat to human dignity and freedom. The point at which those situations will reach the threshold level required for the application of international humanitarian law is not always clear. At the same time, the effectiveness of the protection offered by human rights law until now has been limited, for example, in states of emergency where Governments may derogate from their international human rights obligations. Furthermore, most armed conflicts today are of an internal, rather than international nature. The rules of applicable international humanitarian law may differ depending on the nature and the intensity of the armed conflict. The process of identifying fundamental standards of humanity therefore stems from a recognition of the need for a statement of principles, to be derived from human rights and international humanitarian law, which would apply to every one in all situations.

5. Early discussions on the issue resulted in the adoption, by a group of non-governmental experts, of the Declaration on Minimum Humanitarian Standards (the "Turku Declaration") in 1990, which was submitted to the Commission on Human Rights for consideration initially in 1995 (see E/CN.4/1995/116). In recent years, this process has been discussed by Governments, independent experts and non-governmental organizations at meetings in Oslo (the Norwegian Institute of Human Rights), Vienna (the Organization for Security and Cooperation in Europe), Cape Town (United Nations workshop) and, most recently, in Stockholm (Nordic Governments). The Office of the High Commissioner for Human Rights hosted an informal consultation in September 2000, with participation from Governments, non-governmental organizations, independent experts and ICRC, which identified the subject matter to be covered in the present report.

6. The result of these consultations has been general agreement that there are no evident substantive legal gaps in the protection of individuals in situations of internal violence. There is also broad-based agreement that there is no need for new standards. Nevertheless, situations of internal violence and non-international armed conflicts, including situations where there is a need to ensure accountability of non-State actors, pose particular challenges to securing practical respect for human rights and international humanitarian law. The process of identifying fundamental standards of humanity should therefore aim to strengthen practical protection through the clarification of uncertainties in the application of international humanitarian and human rights law. The starting point for this process is the need to identify fundamental principles applicable to all actors and at all times, including in situations of internal violence as well as in peacetime and situations of armed conflict. As a re-statement of existing principles, fundamental standards of humanity should serve to strengthen the implementation of legal norms and should carry political and moral force in dialogue with non-State actors.

7. In the light of the challenges posed by the character of contemporary conflicts and the involvement of non-State actors in particular, four key issues regarding the protection of fundamental rights in crisis situations have been identified. the threshold of applicability of international humanitarian law; the question of how to deal with States and other actors which have not ratified or cannot ratify treaties; the question of derogation from human rights treaties; and the accountability of armed groups and other non-State actors.

8. The present report constitutes one stage of this ongoing process and will focus on developments that contribute to the clarification of legal uncertainties. The report does not purport to give an exhaustive analysis of the legal developments related to the process of identifying fundamental standards of humanity. Rather, it highlights relevant developments from the ad hoc International Criminal Tribunals and through the adoption of the Rome Statute of the International Criminal Court (ICC Statute). These developments have contributed to improving protection of individuals in all situations through, for example, the elaboration of the rules applicable in internal armed conflict, the establishment of individual criminal responsibility under international law for violations of laws applicable to all armed conflicts and the clarification of the conditions under which a State may be held responsible for acts by non-State entities. An important contribution has also been made through increased State ratification of key instruments of human rights and international humanitarian law. In addition to these developments, practical issues related to the implementation of legal norms are addressed through a review of select ground rules and codes of conduct recently elaborated between parties in the field.

III. RELEVANT DEVELOPMENTS IN INTERNATIONAL LAW

A. Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda

9. The elaboration and application of the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the adoption of the ICC Statute have contributed significantly to the substantive development of international law, in particular with regard to the

application of the rules of international humanitarian law governing non-international armed conflicts and war crimes, the definitions of genocide and crimes against humanity, and the accountability of non-State actors.

10. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international court charged with prosecuting crimes under international law since the post-Second World War Nürnberg and Tokyo tribunals. It was established by the Security Council in 1993 and has jurisdiction over four categories of crimes under international law: grave breaches of the Geneva Conventions of 12 August 1949, violations of the laws and customs of war, genocide and crimes against humanity. The International Criminal Tribunal for Rwanda (ICTR) was created in 1994 to deal with atrocities committed in that country. While nearly identical to ICTY in terms of structure and mode of operation, ICTR differs in its subject-matter jurisdiction. ICTR may prosecute for genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions and of Additional Protocol II to the Conventions.

11. The decisions and judgements of the ad hoc International Criminal Tribunals have made a particular contribution to an increased alignment between the rules applicable in international and non-international armed conflicts. The Tribunals' jurisprudence has also contributed to the further elaboration and development of rules applicable specifically in internal armed conflict.[1] According to the ICTY jurisprudence, there is a common core of substantive international humanitarian law applicable in both international and non-international armed conflicts. In the *Tadic* jurisdiction decision, the Appeals Chamber noted that an extensive body of customary international law applicable to non-international armed conflict had developed. The Chamber confirmed the earlier decision of the International Court of Justice in the *Nicaragua* case, which had stated in unequivocal terms that the norms enumerated in article 3 common to the Geneva Conventions of 12 August 1949 are declaratory of substantive customary international law and that common article 3 constitutes a minimum yardstick for all types of armed conflict.[2] The Chamber elaborated on the *Nicaragua* decision to outline the principal elements of the body of law applicable in internal armed conflicts, which include: rules relating to the protection of civilians and civilian objects; general duty to avoid unnecessary harm; certain rules on means and methods of warfare, especially the ban on the use of chemical weapons and perfidious methods of warfare; and protection of certain objects such as cultural property.[3] It noted that the general essence of the rules and principles governing international armed conflicts, as opposed to the detailed regulation these rules may contain, extends to internal armed conflicts.[4]

12. ICTY further confirmed the existence of a common corpus of international humanitarian law in the rule 61 proceeding against Milan Martic.[5] In that case, the Trial Chamber elaborated the principles on the body of customary international law applicable to all armed conflicts, regardless of their characterization as international or non-international. This body of law is considered to include "general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare."[6] Some commentators have suggested that the affirmation of this common core has reduced the need to characterize armed conflicts as international or internal.

13. ICTY has based its interpretation of the laws applicable in armed conflict on the following definition: "an armed conflict exists whenever there is a resort to armed force between

States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[7] This definition is itself an important development, as it builds on existing provisions of international humanitarian law.[8]

14. ICTY has also clarified, to a certain extent, the distinction between non-international armed conflict and situations of civil unrest or terrorist activities. According to the Tribunal in the *Celebici* judgement, in making this distinction the emphasis should be on the protracted extent of the armed violence and the extent of the organization of the parties involved.[9] With regard to the involvement of armed groups or other non-State entities, the jurisprudence of the Tribunal suggests there is no requirement that such entities should exert control over part of a territory, or that such armed forces have a responsible command - only that there is protracted armed violence between organized armed groups.[10]

15. The increased alignment between rules governing international and non-international armed conflicts is supported by other developments in international humanitarian law. The forthcoming ICRC study on customary rules of international humanitarian law makes a basic distinction between international and non-international armed conflicts and draws out many of the rules common to both situations. The regulations on the observance by United Nations forces of international humanitarian law, which restate a number of rules of international humanitarian law, do not distinguish between the international and non-international conflicts in which United Nations forces are involved.[11] The ICC Statute maintains the distinction between international and non-international armed conflicts, however, it defines war crimes as encompassing violations committed in all situations of armed conflict.[12]

B. Individual criminal responsibility

16. The principle that individuals should be held internationally criminally responsible for acts considered to be harmful by the international community has been well established since the Nürnberg and Tokyo trials following the Second World War. The establishment of individual criminal responsibility for serious violations of international humanitarian and human rights law has, however, been substantially developed in recent years. In terms of institutions, the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda by the United Nations Security Council signalled an important advance, while the adoption in July 1998 of the ICC Statute marked a further vital step towards individual criminal responsibility for such violations.

17. The ICTY Statute provides for individual criminal responsibility in article 7 (1), which states that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime". The Statute also holds that heads of State, government officials, and persons acting in an official capacity are not immune under this provision. The Security Council laid the ground for the establishment of individual criminal responsibility under international law for acts committed in non-international armed conflict through its decision to include violations of common article 3 to the Geneva Conventions and Additional Protocol II in the Statute of ICTR. The Statute is the first international instrument to provide for such responsibility and was an important step towards similar provisions in the ICC Statute.

18. In terms of jurisprudence, the decision of the ICTY Appeals Chamber in the *Tadic* jurisdiction decision broke important ground, in that it was the first assertion by an international or national tribunal that individual criminal responsibility under international law exists for violations of laws applicable to internal armed conflicts.[13] Importantly, the ICTY Appeals Chamber also considered the question of the conditions under which a State could be held responsible for acts by non-State entities in a later decision in the *Tadic* case.[14] It distinguished between the case of single individuals or groups not organized into military structures, on one hand, and that of armed forces, militias or paramilitary units on the other. The Tribunal considered that the latter consisted of individuals making up organized and hierarchically structured groups, such as a military unit or, in case of war or civil strife, armed bands or irregulars or rebels.[15]

19. The meaning and scope of the principle of command or superior responsibility has been clarified in the ICTY case law. In the *Celebici* case, ICTY defined the following as components of superior responsibility: (1) a superior-subordinate relationship; (2) the command/superior must have known or had reason to know that the subordinates were committing crimes; and (3) must have failed to take necessary and reasonable measures to prevent and punish them.[16] The Trial Chamber emphasized that the relationship must be one of "effective control", suggesting that superiors may engage criminal responsibility even in informal structures as long as there exists an effective command.[17] Further, a superior may be responsible not only for giving unlawful orders to commit a crime under the Statute, but also for failing to prevent a crime or to deter the unlawful behaviour of its subordinates through punishment. Moreover superior responsibility may extend, according to the Trial Chamber, "not only to military commanders but also to individuals in non-military positions of superior authority".[18] On the other hand, a claim that an individual was acting upon an order of a Government or superior will not relieve responsibility, and obedience to a superior order may be a mitigating factor only, "if justice so requires".

20. The ICC Statute identifies several categories of individuals who may be held responsible for crimes under international law. The Statute advances the criminalization of offences committed in non-international armed conflicts in particular, while maintaining the distinction between international and internal armed conflicts. Individual criminal responsibility is provided for those individuals who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the Court's jurisdiction. In addition, incitement to commit genocide is prohibited. Article 27 holds that the Statute applies to all persons without distinction, including on the basis of official capacity such as head of State, member of Government or elected representative. Military commanders and other superior authorities are responsible for crimes committed by subordinates under their control, according to article 28.

21. The "superior orders" defence is developed in the ICC Statute, which departs slightly from the interpretation applied by the ad hoc International Criminal Tribunals. Article 33 (1) of the Statute states that superior orders shall not relieve a person of criminal responsibility unless the subordinate was under a legal obligation to obey the order and did not know that the order was unlawful, and the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity are, according to article 33 (2), manifestly unlawful.

C. Crimes under international law

1. Genocide

22. In the provisions regarding the crime of genocide, the ICTY Statute, the Statute of the ICTR and the ICC Statute all restate the definition of genocide found in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. The crime of genocide has, however, been interpreted and developed in recent case law. ICTR gave the first judicial interpretation of the 1948 Genocide Convention in the *Akayesu* case. The Trial Chamber adopted a broad interpretation of genocide, including rape and sexual violence when committed with the intent to destroy in whole or in part a covered group.[19] The Trial Chamber also interpreted the offence of "direct and public incitement to commit genocide" as entailing a provocation to commit genocide "whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication".[20]

2. Crimes against humanity

23. The statutes and jurisprudence of the ad hoc International Criminal Tribunals and the definition of the core crimes contained in the ICC Statute have contributed to the clarification, and have reinforced certain elements of the definition of crimes against humanity. The criminalization of rape as a crime against humanity, for example, has been a major development. Further, according to the ICTY Statute there is no required nexus between the enumerated offence and an international armed conflict, although connection with an armed conflict is required. The Statute of ICTR does not mention armed conflict in its definition of crimes against humanity, thereby disassociating these crimes entirely from any type of armed conflict. With regard to the requirement of a discriminatory intent, the ICTY definition clarifies that discriminatory intent is required only for persecution offences. The ICTR Statute, on the other hand, maintains the requirement of discriminatory intent or grounds with regard to crimes against humanity.

24. The requirement that crimes against humanity be connected with armed conflict has been repeatedly rejected by other international bodies including the International Law Commission (ILC) in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind.[21] In its commentary on article 18 of the Draft Code, the ILC notes that "the definition of crimes against humanity contained in the present article does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Nürnberg Charter. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement".[22] ICTY has confirmed this reasoning, while respecting its own Statute which maintains a link between crimes against humanity and armed conflict. In the *Tadic* appeal, the Tribunal asserted that "(i)t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, ... customary international law may not require a connection between crimes against humanity and any conflict at all".[23]

25. Both the essence and the necessary elements of crimes against humanity have been considered by ICTY. The Tribunal explained the essence of crimes against humanity in the *Erdemovic* case, for example, as "transcend[ing] the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity".[24] In the *Tadic* case the Tribunal outlined the necessary elements of crimes against humanity as requiring that the actions of the accused be linked geographically and temporally with the armed conflict, that those actions "comprise part of a pattern of widespread or systematic crimes directed against a civilian population, and that the accused must have known that his actions fit into such a pattern".[25] The Tribunal suggested that crimes against humanity must involve a course of conduct and not just a particular act, but a single act may qualify as long as there is a link with the widespread or systematic attack against a civilian population. Moreover, according to ICTY, acts committed for purely personal motives can be crimes against humanity when committed in the context of widespread and systematic crimes.[26]

26. Whereas crimes against humanity could be committed only by States or individuals exercising State power during the Second World War, recent developments suggest a rejection of the requirement that they form part of a State policy or action. ICTY has noted that customary international law has evolved to take into account "forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory", including terrorist groups or organizations.[27]

27. With regard to the mens rea element of crimes against humanity, both customary international law and the ICC Statute suggest that no specific intent is necessary. They support a "knowledge" standard which requires only that there be a mental element connecting the underlying offence with the broader attack. The perpetrators need not intend to participate in the attack, nor must they realize that the act is in furtherance of a policy. ICTY has rejected the requirement of discriminatory intent, most recently in the *Aleksovski* appeal in which it affirmed that specific discriminatory intent is only required for the international crimes of persecution and genocide.[28] The Statute of ICTR is the only international legal instrument to require a discriminatory intent for crimes against humanity.

28. ICTY and ICTR have both considered the term "civilian population" in the context of crimes against humanity. In the *Tadic* decision, after reviewing several sources of law ICTY held that "a wide definition of civilian population ... is justified".[29] The Tribunal considered that "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity".[30] The term was considered again in the *Vukovar Hospital Decision*, where civilians or resistance fighters who had laid down their arms were considered as victims of crimes against humanity.[31] ICTR arrived at a similar conclusion with regard to crimes against humanity in the *Akayesu* judgement, where it held that "[w]here there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character".[32]

29. The ICC Statute contains the first codification in a comprehensive multilateral instrument of crimes against humanity. Once established, ICC will have jurisdiction over such crimes whether they are committed in armed conflict or in peacetime, and regardless of whether they

were committed by State or non-State actors. Article 7 of the Statute defines a crime against humanity as an act committed as part of a "widespread or systematic attack against any civilian population, with knowledge of the attack".[33]

30. The ad hoc International Criminal Tribunals have repeatedly affirmed that torture is prohibited by a general rule of international law and that, as a norm of *jus cogens*, the prohibition of torture is absolute and non-derogable in any circumstances.[34] The Tribunals have also adopted the broad definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 which is regarded, in any event, as customary international law.[35] It is important to note, however, that the definition of crimes against humanity in the ICC Statute develops the definition of torture and enforced disappearances by de-linking these offences from the official capacity of the perpetrator. Unlike the definitions contained in the Convention against Torture and the Declaration on the Protection of All Persons from Enforced Disappearance, the ICC Statute provides that, as crimes against humanity, torture and enforced disappearances can be committed by organizations or groups.

3. War crimes

31. The definition of war crimes has also been developed in the case law of ICTY and in the ICC Statute. In the *Tadic* case, the ICTY Trial Chamber examined the necessary connection between an offence and armed conflict, stating that "the existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law."[36]

32. In elaborating the definition of war crimes, ICTY has also developed the notion of "protected persons" in international humanitarian law. In *Tadic* the Tribunal's Chambers discussed the definition of protected persons in international armed conflict, noting that acts could only be characterized as grave breaches if the victims were protected persons under the Geneva Conventions.[37] The Trial Chamber adhered to a literal interpretation of protected persons and held that the victims in *Tadic* were not in the hands of a party to the conflict of which they were not nationals. The Appeals Chamber, however, moved away from a strict adherence to the requirement of nationality and replaced it with factors such as allegiance to, and effective protection by the State. Noting the inadequacy of adhering to the notion of nationality in contemporary inter-ethnic conflicts, the Appeals Chamber held that international humanitarian law should be applied in accordance with "substantial relations" and effective diplomatic protection, rather than nationality. In the *Celebici* case, ICTY clarified this principle and emphasized the need for a flexible interpretation of the nationality requirement.[38]

33. The ICC Statute represents a significant development in that it is the first major multilateral treaty codification of certain war crimes when committed in non-international armed conflicts. The Statute includes armed conflict between government forces and organized armed groups as well as armed conflicts that may take place between such groups in its definition of non-international armed conflict and defines war crimes as encompassing violations committed in both international and non-international armed conflicts.

34. Article 8 (2) of the ICC Statute sets out four categories of acts which fall within the definition of war crimes. Apart from acts already prohibited as grave breaches in international armed conflicts under the Geneva Conventions, the Statute also includes a long list of other acts as war crimes when committed in international armed conflicts in article 8 (2) (b).[39] The article also criminalizes other serious breaches of laws and customs applicable in international armed conflicts based on various sources, including the Hague Conventions of 1907, the Geneva Conventions of 1949, the first Protocol Additional to the Geneva Conventions (Protocol I) of 1977, various conventions banning certain weapons and international customary law. Crimes committed during non-international armed conflicts are separated into two paragraphs in the ICC Statute. Article 8 (2) (c) criminalizes the acts enumerated in article 3 common to the four Geneva Conventions, requiring that the acts involved be "serious".[40]

35. Under article 8 (2) (e), some of the acts listed as serious violations of the laws and customs of war when committed in international armed conflict also constitute war crimes in non-international armed conflict. The article defines non-international armed conflict as a protracted armed conflict on a State's territory between State forces and organized armed groups, or between organized armed groups. It draws on acts prohibited by Additional Protocol II, various treaties on the laws of warfare and customary international law.[41] It is important to note that the threshold for the existence of a non-international armed conflict in paragraph (e) is lower than the threshold of Protocol II, in that neither responsible commanders, nor control of a part of the territory is required.

D. Developments related to ratification and implementation of human rights and international humanitarian law

36. While a few international humanitarian law and human rights instruments have near-universal ratification (the four Geneva Conventions and the Convention on the Rights of the Child, for example), some international instruments that are particularly relevant in crisis situations have a much lower ratification record. Ratification of these instruments by States most at risk of experiencing situations of violent conflict is therefore especially important.

37. Recent efforts have been made to increase ratification of the core human rights and international humanitarian law instruments. In the United Nations Millennium Declaration, heads of State and Government resolved, *inter alia*, "to ensure the implementation by States parties of treaties in areas such as arms control and disarmament, and of international humanitarian law and human rights law", and called upon all States to consider signing and ratifying the ICC Statute.[42] States committed themselves to a variety of measures to ensure respect for human rights and fundamental freedoms and to ensure that civilian populations, and children in particular, are given every assistance and protection.

38. In preparation for the Millennium Summit, the Secretary-General identified a core group of 25 multilateral treaties which reflect the key policy goals of the United Nations and the spirit of the Charter of the United Nations. The core conventions, which include human rights treaties as well as conventions on refugees and stateless persons, penal matters, disarmament and the environment, were the object of a sustained effort to encourage signature and ratification.[43] The Secretary-General invited heads of State and Government to make use of the opportunity provided by the Millennium Summit to rededicate themselves to the international legal order.

39. States have made similar expressions of their commitment to ratification with regard to international humanitarian law. At the twenty-seventh International Conference of the Red Cross and Red Crescent in 1999, Governments pledged to commit themselves, over the next four-year period, to ratify international humanitarian law treaties and to adopt appropriate implementing measures to give effect to international obligations at the national level. Pledges focused in particular on measures to repress war crimes, protect the Red Cross and Red Crescent emblems, set up and continue supporting national commissions on international humanitarian law and develop programmes to teach and disseminate international humanitarian law.[44]

IV. GROUND RULES, CODES OF CONDUCT AND MEMORANDUMS OF UNDERSTANDING

40. The role and responsibility of armed groups and other non-State actors in armed conflict and in situations of internal violence raises important challenges. While international humanitarian law applicable in non-international armed conflict does bind non-State actors, its rules are not sufficiently detailed to ensure comprehensive protection of persons affected by non-international armed conflict. Human rights law, on the other hand, formally binds only States. In order to ensure full respect for the rights of individuals in all situations, there is therefore a need for strategies to persuade armed groups to adhere to fundamental principles of international humanitarian law and human rights law.

41. An overview of agreements concluded at the field level provides some insight into how fundamental principles are being promoted on the ground between humanitarian agencies and both States and non-State entities. In general, two kinds of agreements are identified. The first is comprised of codes of conduct elaborated by humanitarian agencies themselves, which state guiding principles for agencies in their humanitarian work. A second category consists of agreements between these agencies and local authorities working, together with other parties, towards the implementation of humanitarian aid. The purposes of the agreements range from a reaffirmation and elaboration of fundamental humanitarian principles in light of a given emergency environment and the interpretation of international humanitarian and human rights law according to the needs of the crisis, to the establishment of general standards of conduct and achievement of humanitarian organizations, agreements on standards of conduct among humanitarian organizations and agreements on standards of conduct between them and parties to the conflict. A few examples are provided below.

42. The Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations between the Government of Sudan, the Sudan People's Liberation Movement (SPLM) and the United Nations Operation Lifeline Sudan (OLS)[45] commits the humanitarian actors involved in OLS and the relief wings of warring factions to certain mutual responsibilities. The agreement, which refers to the importance of "strict adherence to the highest standards of conduct and international humanitarian principles", is based upon principles including the right to humanitarian assistance, the right of civilians to full legal protection under international human rights law and international humanitarian law, transparency, accountability to donors and beneficiaries, and the protection of humanitarian personnel. Importantly, the agreement states that while the SPLM is "not legally responsible for protecting and promoting the legal rights and

entitlements of the civilian populations", it is "legally bound by customary human rights law and has a moral and ethical obligation to protect and promote the rights of the civilian population living in areas under its control".

43. Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo[46] were agreed upon to serve as a basis for seeking "consensus on a common approach to the delivery of humanitarian assistance" aimed at "increasing the efficiency and the pertinence of the delivered aid and maximizing the humanitarian space for the relief community". The Principles are addressed to the humanitarian community as well as to the political and military authorities. They refer explicitly to the Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief as an integral part of the agreement. While the Principles contain a human rights clause which falls short of the commitment made in the OLS/SPLM Agreement in terms of acceptance of international human rights law by the parties to the conflict, they nonetheless reaffirm the place of human rights in humanitarian assistance.

44. In 1996, the Government of Burundi and UNICEF signed a Declaration of Commitment to the Protection of the Children of Burundi.[47] This Declaration recalls the Convention on the Rights of the Child, highlights provisions of international humanitarian law on the conduct of hostilities, the provisions of humanitarian assistance and the protection of children in armed conflict. It stresses the obligation of all parties to take steps to guarantee certain protection and assistance for children. The parties to the Declaration agree to elaborate a joint programme of action that should be implemented in cooperation with United Nations agencies, international and national NGOs and the communities.

45. The Code of Conduct for Humanitarian Assistance in Sierra Leone[48] contains certain guiding principles for States and non-State entities. The principles state that while the primary responsibility for the protection and well-being of the civilian population and respect for their human rights rests with the Government of the State or authorities in control of the territory, "insurgent groups and militia should be held to the same standard of responsibility as Governments".

V. OTHER DEVELOPMENTS

46. As noted in previous reports, two ongoing developments are of central importance to the process of fundamental standards of humanity.[49] First, the identification of customary rules of international humanitarian law in the forthcoming ICRC study should help to clarify some of the uncertainties or apparent gaps in conventional law and, in particular, to further elaborate the rules applicable in internal armed conflict. A second key development relates in particular to situations of internal disturbance or violence that do not reach the required threshold for the application of international humanitarian law by States. These situations may, under certain conditions, constitute a state of emergency that threatens the life of the nation which would justify derogation by the State from its obligations under international human rights law. It is, however, precisely in such situations that individuals are at greatest risk of human rights violations. The Human Rights Committee's forthcoming revision of its general comment on

article 4 of the International Covenant on Civil and Political Rights will help to clarify the circumstances under which a State may properly derogate from its obligations under the Covenant.

VI. CONCLUDING REMARKS

47. A brief mapping of some of the recent developments in international law, and in particular of the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the adoption of the ICC Statute, shows that important progress has been made towards the clarification of legal uncertainties with regard to fundamental standards of humanity.

48. From the review of the work of the two ad hoc International Criminal Tribunals, it is clear that the jurisprudence has made an important overall contribution to the protection of individuals in all situations through the reassertion of the centrality of the principle of human dignity to human rights law and international humanitarian law.[50] This contribution includes the elaboration of the rules applicable in situations of armed conflict and, in particular, the rules applicable in internal armed conflict, the establishment of individual criminal responsibility under international law for violations of laws applicable to all armed conflicts, and the clarification of the conditions in which States have responsibility for the actions of non-State entities.

49. Important issues remain unresolved and will require further consideration in the light of ongoing developments. It is clear from the above survey that fundamental principles of human rights and international humanitarian law should be central to field agreements concluded between States, non-State actors and humanitarian agencies. Given the nature of contemporary conflicts and the challenges related to the implementation of international legal standards in situations of internal armed conflict, however, the question of the obligations of non-State armed groups towards those within a territory or population they control merits further study. Other issues such as the relationship of individual members of such groups to the leaders or those with authority over the group should also be explored.[51]

50. Consideration of the ICRC study on customary rules of international humanitarian law and the Human Rights Committee's revised general comment on derogation, as already mentioned, will be vital to future study on fundamental standards of humanity. Further study should also benefit from a consideration of ongoing developments in regional human rights courts as well as national case law and legislation.

Notes

[1] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction. Consider the statement made by the Appeals Chamber at para. 97: "Why protect civilians from belligerent violence, or even ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while

of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."

[2] Ibid., para. 102.

[3] Ibid., paras. 96-127.

[4] Ibid., para. 126.

[5] *Prosecutor v. Milan Martic*, Case No. IT-95-11-R61, Review of the Indictment Pursuant to rule 61, ICTY Trial Chamber, 8 March 1996.

[6] Ibid., paras. 10-18. At paragraph 12 the Chamber explained that "(t)he customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and article 13 of Additional Protocol II ... prohibit attacks against the civilian population as such, as well as individual civilians. Both provisions explicitly state that this rule shall be observed in all circumstances. The Appeals Chamber reaffirmed that both articles constitute customary international law."

[7] *Prosecutor v. Tadic*, op. cit., Appeal on Jurisdiction, paras. 67 and 70.

[8] Articles 2 and 3 common to the four Geneva Conventions of 12 August 1949; article 1, Additional Protocol I; article 1, Additional Protocol II.

[9] *Prosecutor v. Delalic et al. ("Celebici")*, Case No. IT-96-21, Trial Chamber Judgement of 16 November 1998, para. 184.

[10] *Prosecutor v. Tadic*, op. cit., Appeals Chamber judgement of 15 July 1999.

[11] Observance by United Nations forces of international humanitarian law (ST/SGB/1999/13), Secretary-General's Bulletin, 6 August 1999.

[12] Statute on the International Criminal Court, articles 8 (2) (c) and (e).

[13] *Prosecutor v. Tadic*, op. cit., Appeal on Jurisdiction.

[14] *Prosecutor v. Tadic*, op. cit., Appeals Chamber judgement of 15 July 1999.

[15] Ibid., para. 120.

[16] *Prosecutor v. Celebici*, op. cit.

[17] Ibid., paras. 354 and 378.

[18] Ibid., para. 363.

[19] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, para. 688: "The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."

[20] Ibid., para. 559.

[21] Report of the International Law Commission on the work of its forty-eighth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10 and corrigendum), Chap. II.

[22] Ibid., article 18, commentary, para. (6).

[23] "Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in article 5 comports with the principle of *nullum crimen sine lege*." *Prosecutor v. Tadic*, op. cit., Appeal on Jurisdiction, paras. 28-40.

[24] *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgement of 29 November 1996, para. 28.

[25] *Prosecutor v. Tadic*, op. cit., Appeals Chamber judgement of 15 July 1999, para. 248.

[26] Ibid.

[27] The ILC Draft Code states that crimes against humanity must be "instigated or directed by a Government or any other organization or group", while the ICC Statute defines crimes against humanity in relation "to a State or organizational policy".

[28] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, judgement of 24 March 2000.

[29] *Prosecutor v. Tadic*, op. cit., Trial Chamber II Judgement of 7 May 1997, para. 643.

[30] Ibid.

[31] *Prosecutor v. Mrksic, Radic, Sljivancanin and Dokmanovic* ("*Vukovar Hospital Decision*"), Case No. IT-95-13a.

[32] *Prosecutor v. Akayesu*, op. cit., para. 582.

[33] The specific acts include murder, extermination, enslavement, deportation or forcible transfer of a population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, enforced disappearance of persons, apartheid, other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

[34] *Prosecutor v. Celebici*, op. cit., para. 446 and *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber II judgement of 10 December 1998, para. 139.

[35] *Prosecutor v. Celebici*, ibid., paras 452-459; *Prosecutor v. Furundzija*, ibid., paras. 143-162.

[36] *Prosecutor v. Tadic*, op. cit., Trial Chamber Judgement of 7 May 1997, para. 572.

[37] *Prosecutor v. Tadic*, op. cit., Appeals Chamber judgement of 15 July 1999.

[38] The commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus ... that their protections should be applied to as broad a category of persons as possible. It would, indeed, be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship under domestic law. *Prosecutor v. Celebici*, op. cit., Trial Chamber Judgement of 16 November 1998, para. 263.

[39] Among them are sexual slavery, enforced prostitution, conscripting or enlisting children under 15, and attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission.

[40] The following constitute war crimes when committed against individuals not directly participating in the hostilities, including members of armed forces who have laid down their arms or been placed hors de combat due to illness, injury, detention, or any other cause: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees that are generally recognized as indispensable.

[41] The criminal acts listed under article 8 (2) (e) include: intentionally directing attacks against the civilian population not taking direct part in hostilities; intentionally launching attacks against

personnel or equipment of a humanitarian or peacekeeping mission; committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of the four Geneva Conventions; conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities; ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

[42] United Nations Millennium Declaration, General Assembly resolution 55/2 of 18 September 2000.

[43] The instruments which attracted the most attention, and which were signed or for which instruments of ratification were deposited at the Millennium Summit, include:

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict - 59 signatures/2 ratifications;

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography - 57 signatures/1 ratification;

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - 18 signatures/4 ratifications;

Rome Statute of the International Criminal Court - 12 signatures/4 ratifications;

International Convention for the Suppression of the Financing of Terrorism - 10 signatures/2 ratifications;

Convention on the Safety of United Nations and Associated Personnel - 7 ratifications and accessions.

The total number of ratifications for the core human rights treaties as of 15 November 2000 is as follows:

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	123
International Convention on the Elimination of All Forms of Racial Discrimination	156
International Covenant on Economic, Social and Cultural Rights	143
International Covenant on Civil and Political Rights	147
Optional Protocol to the International Covenant on Civil and Political Rights	97

Second Optional Protocol to the International Covenant on Civil and Political Rights	44
Convention on the Elimination of All Forms of Discrimination against Women	166
Convention on the Rights of the Child	191

[44] Report of the Secretary-General on the Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts (A/55/173 and Add.1 and Corr.1 and 2); Plan of Action for the years 2000-2003, twenty-seventh International Conference of the Red Cross and Red Crescent, para. 36, available at www.icrc.org/eng/conf27. The number of ratifications of the 1949 Geneva Conventions and their 1977 Protocols, as of 15 November 2000, is as follows:

Geneva Conventions I-IV	189
Protocol I	157
Protocol II	150

[45] Geneva, 15 December 1999.

[46] Available as an annex to the United Nations Consolidated Inter-Agency Appeal for the Democratic Republic of Congo (2000) at http://www.reliefweb.int/library/appeals/drc00.pdf.

[47] Déclaration d'engagement à la protection des enfants du Burundi, signed by the Government of Burundi and UNICEF, February 1996.

[48] Available as an annex to the United Nations Consolidated Inter-Agency Appeal for Sierra Leone (1999) at http://www.reliefweb.int/library/appeals/sle99.pdf.

[49] Important work ongoing in other forums will also contribute to the process of fundamental standards of humanity. The International Institute of Humanitarian Law, for example, is developing a manual on international humanitarian law in internal armed conflicts. The Institute began work on the research project in 1999 with a view to improving knowledge of the principles and rules of conduct in non-international conflicts through the publication of "a manual of high standard, based on experience from various conflicts in different parts of the world and developed on the background of existing legal writings in this field". The manual will follow the example set by the *Manual on International Law Applicable to Armed Conflicts at Sea* published by the Institute in 1994 and will, importantly, be designed primarily for use by "operators", including members of both the regular State armed forces and armed groups.

[50] This notion was stressed by ICTY in the *Furundzija* case: "The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is ... the very *raison d'être* of international humanitarian law and human rights law;

indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person." *Prosecutor v. Furundzija*, Case No. IT-95-17/I-T, op. cit., para. 183.

[51] Further consideration of the international legal accountability of non-State entities for human rights violations should benefit, *inter alia*, from the recent study by the International Council on Human Rights Policy on human rights approaches to armed groups.